Shahrullah bin Abdul Rakeb v Public Prosecutor

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–17 OF 2009
HASAN LAH, ABDUL MALIK ISHAKAND AZHAR MA'AH JJCA
8 OCTOBER 2011

B

Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Dangerous drugs found in sling bag carried by appellant — Whether trial judge misdirected himself when he allowed prosecution to call rebuttal witness — Whether trial judge erred in accepting evidence of rebuttal witness at face value — Whether trial judge had erred in his failure to appreciate defence case — Dangerous Drugs Act 1952 s 39B(1)

C

D

Criminal Procedure — Witness — Rebuttal witness — Prosecution allowed to call rebuttal witness after close of defence case — Whether there was 'special or exceptional circumstance' that warranted rebuttal evidence — Whether trial judge misdirected himself when he allowed prosecution to call rebuttal witness — Criminal Procedure Code s 425

E

Acting on information received of drug trafficking activities by usage of a certain motorcycle at a location in Gombak, a police party headed by an ('ASP') had conducted an observation at that location. During that surveillance the ASP and certain other members of the police party had spotted the target motorcycle ridden by one Mohd Lamran bin Yamsah ('Lamran') with the appellant as pillion entering the petrol kiosk in that location. The police party then saw the appellant with a sling bag hung across his shoulders alight from the motorcycle and head towards the toilet of the petrol kiosk, while Lamran was seen entering a McDonald's restaurant nearby. In the toilet at the petrol kiosk the appellant, who was still carrying the sling bag, was detained by members of the police party who had trailed him. Thereafter, a struggle ensued but the appellant was finally restrained and brought out of the toilet still carrying the sling bag. When the bag that the appellant was carrying was searched by the ASP it was found to contain a black plastic bag that contained two slabs of compressed plant material, which were later confirmed by the chemist to be 1,727g of cannabis. The appellant was charged with trafficking in 1,727g of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). At the close of the prosecution's case, the trial judge was of the view that the prosecution had proved a prima facie case against the appellant and called upon the latter to enter his defence. The appellant's defence was that the sling bag he was carrying did not belong to him but to Lamran and that he had ended up carrying the bag because it was less uncomfortable with it slung on his

F

G

H

I

shoulders while he was riding pillion on Lamran's motorcycle. He also claimed that he had tried to escape from the members of the police party because he thought they were robbers. The appellant further claimed that after he was escorted out of the toilet, he was brought before the ASP, who had searched the sling bag and found it to be empty. However, another man had come out of the toilet carrying a plastic bag, which he had handed to the ASP and which when examined by the ASP was found to contain the cannabis. After the appellant had closed his defence, the prosecution applied to call Lamran as a rebuttal witness for the purpose of establishing whether the sling bag belonged to him. Although the defence objected to the prosecution's application the trial judge allowed it pursuant to s 425 of the CPC. At the close of the hearing the trial judge concluded that the defence had failed to raise a reasonable doubt against the prosecution case, convicted the appellant of trafficking and sentenced him to death. This was the appellant's appeal against that decision. The appellant submitted that the trial judge had misdirected himself when he allowed the prosecution to call Lamran as a rebuttal witness; that the trial judge had erred in accepting the evidence of the rebuttal witness at face value; and that the trial judge had erred in his failure to appreciate the defence case. According to the appellant, his failure to put to the prosecution witnesses that the sling bag belonged to Lamran and not him was not crucial for the calling of Lamran as a rebuttal witness. The appellant maintained that the ownership of the sling bag was only a part of his narration and not the case of the defence. As such, the appellant contended that the basis upon which the trial judge allowed the rebuttal evidence did not qualify as a 'special or exceptional circumstance' warranting rebuttal evidence.

Held, dismissing the appeal:

(1) This court found that on the facts of the present appeal and especially the defence of the appellant the trial judge was justified in invoking s 425 of the CPC to allow the prosecution to call Lamran as a rebuttal witness. The appellant's testimony that the sling bag belonged to Lamran and that by necessary inference the black plastic bag found in the sling bag also belonged to Lamran and not the appellant only became relevant when the appellant gave evidence. As such, there were special or exceptional circumstances to support the decision of the trial judge in allowing Lamran to be called as a rebuttal witness. The exercise of the decision of the trial judge was essentially done in order to arrive at a just decision (see paras 36–37, 43 & 53).

(2) Further, if as argued by the appellant, the ownership of the sling bag was of no consequence and the core of the defence was that the dangerous drugs were not found inside the sling bag but elsewhere, then the appellant should not object to the prosecution calling Lamran as a rebuttal witness in order to show ownership of the sling bag (see para 45).

(3) The appellant's submission that the calling of Lamran after the defence had closed its case prevented the appellant from invoking s 114(g) of the Evidence Act 1950 had no merit (see para 45).

(4) The trial judge believed Lamran to be a witness of veracity and accepted his evidence in relation to the sling bag. The trial judge, who had the benefit of hearing and seeing Lamran testifying, could not be faulted on his treatment of Lamran's evidence. This was not the case where the trial judge convicted the appellant solely on his demeanour. The overwhelming evidence tendered by the prosecution and the weak defence were the crucial factors that turned the tide against the appellant (see paras 63–70).

(5) The trial judge was entitled to criticise the defence as a weak defence. Having perused the grounds of judgment of the trial judge, this court found that the trial judge had correctly appraised the facts and the rebuttal evidence of Lamran and had not misdirected himself on the law. Based on the evidence this court was satisfied beyond reasonable doubt that the appellant had custody and control of the sling bag and he knew that it contained the offending drugs. As such, there was no appealable error (see paras 73–81).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima tentang aktiviti pengedaran dadah dengan menggunakan motosikal tertentu di suatu lokasi di Gombak, sepasukan polis yang diketuai oleh seorang PSP telah menjalankan pengawasan di lokasi itu. Semasa pengawasan itu PSP itu dan anggota tertentu lain pasukan polis itu telah mengecam motosikal yang menjadi sasaran itu yang dibawa oleh Mohd Lamran bin Yamsah ('Lamran') dengan perayu sebagai pembonceng memasuki kios petrol di lokasi tersebut. Pasukan polis kemudian nampak perayu dengan beg sandang yang terletak selimpang di bahunya turun daripada motosikal tersebut dan menuju ke arah tandas di kios petrol itu, manakala dilihat memasuki restoran McDonald berdekatan. Dalam tandas di kios petrol itu perayu, yang masih membawa beg sandang itu, telah ditahan oleh anggota pasukan polis yang mengekorinya. Berikutan itu, satu pergelutan berlaku tetapi perayu akhirnya ditahan dan dibawa keluar tandas dengan masih membawa beg sandang tersebut. Apabila beg yang dibawa oleh perayu diperiksa oleh PSP didapati ia mengandungi beg plastik hitam yang mengandungi dua papan bahan tumbuhan, yang kemudian disahkan oleh ahli kimia adalah kanabis seberat 1,727g. Perayu telah dituduh mengedar 1,727g kanabis di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut'). Di penutup kes pendakwaan, hakim perbicaraan berpendapat bahawa pendakwaan telah membuktikan kes prima facie terhadap perayu dan memanggilnya untuk memasuki pembelaannya. Pembelaan perayu adalah bahawa beg sandang yang dibawanya bukan miliknya tetapi milik Lamran dan dia terpaksa membawa beg itu kerana ia lebih selesa disandang di bahunya

sambil membonceng motosikal Lamran. Dia juga mengatakan bahawa dia cuba melarikan diri daripada anggota pasukan polis kerana difikirnya mereka perompak. Perayu selanjutnya mengatakan selepas dia diiring keluar tandas itu, dia dibawa kepada PSP, yang memeriksa beg sandang itu dan mendapatinya kosong. Walau bagaimanapun, seorang lelaki lain keluar daripada tandas itu membawa beg plastik, yang diserahkan kepada PSP dan yang kemudian diperiksa oleh PSP dan didapati mengandungi kanabis. Selepas perayu menutup pembelaannya, pendakwaan memohon untuk memanggil Lamran sebagai saksi untuk mematahkan keterangan bagi tujuan membuktikan sama ada beg sandang itu miliknya. Walaupun pembelaan membantah permohonan pendakwaan hakim perbicaraan membenarkannya menurut s 425 Kanun Acara Jenayah ('KAJ'). Di penutup perbicaraan hakim perbicaraan memutuskan bahawa pembelaan gagal menimbulkan keraguan munasabah terhadap kes pendakwaan, mensabitkan perayu kerana pengedaran dan menjatuhkan hukuman mati ke atasnya. Ini adalah rayuan perayu terhadap keputusan tersebut. Perayu berhujah bahawa hakim bijaksana telah salah arah apabila membenarkan pendakwaan memanggil Lamran sebagai saksi untuk mematahkan keterangan; bahawa hakim perbicaraan terkhilaf dalam menerima keterangan saksi pematahan pada dasarnya; dan bahawa hakim perbicaraan terkhilaf kerana gagal menerima kes pembelaan. Menurut perayu, kegagalannya untuk menunjukkan kepada saksi pendakwaan bahawa beg sandang itu milik Lamran dan bukan miliknya tidak penting untuk memanggil Lamran sebagai saksi pematahan. Perayu menegaskan bahawa pemilikan beg sandang itu hanya sebahagian daripada hujahnya dan bukan kes pembelaan. Oleh itu, perayu berhujah bahawa berasaskan itu yang mana hakim perbicaraan membenarkan keterangan pematahan itu tidak diterima sebagai keadaan istimewa atau terkecuali untuk mewajarkan keterangan pematahan.

Diputuskan, menolak rayuan:

(1) Mahkamah ini mendapati bahawa berdasarkan fakta rayuan ini dan khususnya pembelaan perayu hakim perbicaraan wajar menggunakan s 425 KAJ untuk membenarkan pendakwaan memanggil Lamran sebagai saksi pematahan. Testimoni perayu bahawa beg sandang itu milik Lamran dan bahawa, melalui inferens yang perlu beg plastik hitam yang dijumpai dalam beg sandang itu juga milik Lamran dan bukan perayu hanya menjadi relevan apabila perayu memberikan keterangan. Oleh itu, terdapat keadaan istimewa atau terkecuali untuk menyokong keputusan hakim perbicaraan membenarkan Lamran dipanggil sebagai saksi pematahan. Pelaksanaan keputusan hakim perbicaraan dilakukan sewajarnya bagi tujuan mencapai keputusan yang adil (lihat perenggan 36–37, 43 dan 53).

(2) Selanjutnya, jika sebagaimana dihujah oleh perayu, milik beg sandang itu tidak ada akibatnya dan yang penting dalam pembelaan adalah dadah

berbahaya itu tidak dijumpai dalam beg sandang itu tetapi di tempat lain, maka perayu tidak patut membantah pendakwaan memanggil Lamran sebagai saksi pematahan bagi tujuan menunjukkan milik beg sandang itu (lihat perenggan 45).

(3) Hujah perayu bahawa dengan memanggil Lamran selepas pembelaan telah menutup kesnya menghalang perayu daripada menggunakan s 114(g) Akta Keterangan 1950 adalah tidak bermerit (lihat perenggan 45).

(4) Hakim perbicaraan mempercayai Lamran seorang saksi yang jujur dan menerima keterangannya berkaitan beg sandang itu. Hakim perbicaraan juga, yang telah mendengar dan melihat Lamran memberi keterangan, tidak boleh dipersalahkan berhubung penerimaan beliau terhadap keterangan Lamran. Ini bukan kes di mana hakim perbicaraan mensabitkan perayu semata-mata berdasarkan sikapnya. Keterangan yang banyak dikemukakan oleh pendakwaan dan pembelaan yang lemah merupakan faktor penting yang tidak memihak terhadap perayu (lihat perenggan 63–70).

(5) Hakim bijaksana berhak untuk mengkritik pembelaan sebagai pembelaan yang lemah. Setelah meneliti alasan-alasan penghakiman hakim perbicaraan, mahkamah ini mendapati bahawa bahawa hakim perbicaraan telah sewajarnya meneliti fakta dan keterangan yang boleh dipatahkan oleh Lamran dan tidak salah arah dari segi undang-undang. Berdasarkan keterangan tersebut mahkamah ini berpuas hati melampaui keraguan munasabah bahawa perayu mempunyai jagaan dan kawalan ke atas beg sandang itu dan dia mengetahui bahawa ia mengandungi dadah berbahaya. Oleh itu, tidak ada kesilapan yang boleh dirayu (lihat perenggan 73–81).]

Notes

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 191–274.

For cases on witness in general, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5512–1803.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (dirujuk)
Balfour v PP [1949] Supp MLJ 8, CA (refd)
R v Blick (1966) 50 Cr App R 280, CCA (refd)
Chew Gim Ser v PP [2005] 1 SLR 201, HC (refd)
Chia Sze Chang v PP [2002] 4 SLR 523, HC (refd)
Chua Keem Long v PP [1996] 1 SLR 510, HC (refd)
DA Duncan v PP [1980] 2 MLJ 195, FC (refd)
R v Flynn (1957) 42 Cr App R 15 (refd)

Khua Kian Keong and another v PP [2003] 4 SLR 526, HC (refd)
Kwang Boon Keong Peter v PP [1998] 2 SLR 592, HC (refd)
Leow Nghee Lim v Reg [1956] MLJ 28 (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465, FC (refd)
PP v Abdul Hamid [1969] 1 MLJ 53 (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705; [2000] 4 CLJ 649, HC (refd)
PP v Ling Tee Huah [1982] 2 MLJ 324 (refd)
PP v Nur Hassan bin Salip Hashim & Anor [1993] 2 CLJ 551, HC (refd)
R v James Milliken (1969) 53 Cr App R 330, CA (refd)
R v Killick (1980) 24 SASR 137 (refd)
Regina v Frost And Eleven Others (1839) 9 Car & P 129 (refd)
Regina v John Owen [1952] 2 QB 362 (refd)
Regina v Rowton (1865) Le & Ca 520 (refd)
Rex v Butterwasser [1948] 1 KB 4 (refd)
Tengku Mahmood v PP [1974] 1 MLJ 110 (refd)

Legislation referred to

Criminal Procedure Code ss 180, 425
Dangerous Drugs Act 1952 ss 2, 37(da), 39B(1)(a), 39B(2)
Evidence Act 1950 s 114, 114(g)
Penal Code s 34

Hisham Teh Poh Teik (Teh Poh Teik & Co) for the appellant accused.
Fatnin bt Yusof (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent/prosecution.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant was charged for trafficking in cannabis weighing 1,727g on 10 August 2005 at about 8.15pm in front of McDonald's restaurant at a Projet petrol station, Lot PT 5946, Jalan Lingkaran Tengah 2, off Lebuh Raya Kuala Lumpur-Karak, in the district of Gombak, in the State of Selangor, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act') punishable under s 39B(2) of the same Act.

[2] At the close of the defence case, the learned judicial commissioner ('JC') found the appellant guilty of the said charge and convicted him accordingly. As mandated by the law, the learned JC sentenced the appellant to death by hanging. The appellant now appeals against his conviction and sentence to this

court.

FACTS OF THE CASE

[3] On 10 August 2005 at about 4pm, ASP Ahmad Tarmizi (SP1) received an information about drug trafficking involving a male person using motorcycle model RXZ bearing registration No WCK 897 at the location as stated in the charge. SP1 briefed his police personnel numbering 17 in all about the information which he received and, on the same day at 6.30pm, SP1 and his police party proceeded to the location as stated in the charge and upon arrival at 7.30pm, SP1 and his police party took up ambush positions and waited.

[4] Both SP1 and Corporal RF/93257 Mohd Salleh bin Paiman (SP5) together with two other policemen waited in the motorcar and observed.

[5] At about 8.15pm, SP1 and SP5 saw the target motorcycle ridden by Mohd Lamran bin Yamsah (SPRI) ('Lamran') with the appellant as the pillion entering the petrol kiosk area and stopped in front of the McDonald's restaurant. At this point of time, both SP1 and SP5 saw the appellant with a sling bag (P6C) hung across his shoulders behind him alighted from the motorcycle and headed towards the toilet of the petrol kiosk. And Lamran was seen entering the McDonald's restaurant.

[6] SP1 and SP5 together with the other ambush parties quickly rushed into the same toilet at the petrol kiosk and they saw the appellant standing in front of a sink before a wall mirror as per photographs marked 'N' and 'O' at p 250 of the appeal record at *jilid* III with the same sling bag (P6C) still slung on his back over his shoulders. In the toilet, SP1 identified himself as a police officer to the appellant and the latter looked scared and had tried to evade arrest by putting up a struggle. The appellant was overpowered by the police party and he was brought out of the same toilet together with the sling bag (P6C). SP1 examined the sling bag (P6C) that was seized from the appellant in his presence as well as before the other police parties. The examination of the sling bag (P6C) was done in the front area outside the same toilet. Upon examining the sling bag (P6C), SP1 found inside it a black plastic bag. On further examination of the black plastic bag, SP1 found two slabs of dried leaves suspected to be cannabis wrapped in transparent plastic. The appellant together with the seized items were brought back to the police station for further investigation. Lamran who was the rider of the motorcycle was also arrested and brought back to the police station.

[7] SP5 corroborated the version of SP1. In due course, Chief Inspector Noresah bt Abd Rashid (SP7) sent the two slabs of plant materials to the

A government chemist Wan Rahimah bt Wan Ahmad (SP4) for analysis and SP4 confirmed that they were cannabis as defined under s 2 of the same Act.

ANALYSIS

B **[8]** The learned JC in a flawless exercise, assessed on a maximum evaluation basis the prosecution witnesses' testimonies and came to a finding that the prosecution has succeeded in establishing a prima facie case as encapsulated in s 180 of the Criminal Procedure Code and explained by the Federal Court in
C *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85.

[9] The appellant elected to give his evidence on oath. His defence went along these lines. That on that fateful day, he had received a telephone call from his friend by the name of Lamran who had requested his assistance to help
D Lamran to retrieve Lamran's motorcycle which had broken down. That he agreed to help notwithstanding that he suffered from a severe bout of diarrhea-like illness. That Lamran came to his house on a motorcycle to fetch him. That Lamran carried a sling bag (P6C) across Lamran's shoulders. That he felt uncomfortable as a pillion rider because the sling bag (P6C) pressed against
E his painful stomach. That he told Lamran of his tummy ache and Lamran suggested to him to carry the sling bag (P6C) instead. That was how he ended up carrying the sling bag (P6C) by slinging it over his shoulders on his back. That along the way Lamran decided to stop at the petrol station at the highway to meet a friend there. That when Lamran stopped at the petrol station he
F proceeded to the public toilet because of his stomach pain and that he went to the said toilet twice, the first visit to the said toilet was with Lamran. That during his second visit to the said toilet, he was accosted by a group of men whom he did not know and whom he believed to be robbers bent to rob him. That because of that perception, he had tried to run away but was over powered
G and pushed to the floor of the said toilet by those men. That when he was escorted outside the said toilet, he saw for the first time a police officer whom he identified as SP1. That SP1 then proceeded to examine the sling bag (P6C) that he was carrying on his back and SP1 found the sling bag (P6C) to be empty. That a Malay man subsequently had come out from the said toilet
H bringing with him a black plastic bag and handed it to SP1. That SP1 examined the black plastic bag and found that it contained two slabs of plant materials. That he had never seen such slabs of plant materials before that day. That he did not carry the two slabs of plant materials.

I **[10]** Under cross-examination, the appellant had this to say. That when he carried the sling bag (P6C), he had found the sling bag (P6C) to be neither heavy nor light. In his own words he said, 'tak ringan, tak berat' (see p 118 of the appeal record at *jilid* II). He said that he felt that the sling bag (P6C) contained something, but he did not know what it was. In his own words, 'Saya

rasa beg P6C itu ada berisi. Saya tidak tahu apa isi beg itu' (see p 118 of the appeal record at *jilid* II). That he always saw Lamran bringing the sling bag (P6C) containing Lamran's repair tools in a tool-box because Lamran was a motorcycle mechanic.

[11] All the salient features of the case for the prosecution were put to the appellant but he vehemently denied them.

[12] Finally, when the appellant completed his evidence and closed his defence the learned deputy public prosecutor applied to call a rebuttal witness in the person of Lamran himself. The learned JC acceded to the prosecution's request and so we have Lamran taking the stand for the prosecution and Lamran's evidence demolished the defence of the appellant.

[13] Before us, learned counsel for the appellant in the person of Mr Hisyam Teh Poh Teik canvassed the following pertinent grounds for our consideration:

(a) that the learned JC misdirected himself when he allowed to call Lamran as a rebuttal witness;

(b) that the learned JC erred in that His Lordship accepted the evidence of the rebuttal witness at face value; and

(c) that the learned JC erred in appreciating the defence case.

[14] We will now examine these grounds separately.

THE FIRST GROUND

[15] After the appellant had closed his defence, the prosecution applied to the learned JC to call Lamran as a rebuttal witness. The defence objected to the prosecution's application but the learned JC allowed the application pursuant to s 425 of the Criminal Procedure Code. Mr Hisyam Teh Poh Teik submitted that the learned JC had misdirected himself for the following reasons:

(a) in failing to exercise His Lordship's discretion properly in that his Lordship failed to recognise that a rebuttal witness can only be called in 'very special or exceptional circumstances' and this test was not discussed by His Lordship; and

(b) in failing to consider whether the calling of Lamran as a rebuttal witness had prejudiced or disadvantaged the defence case.

[16] Our attention was drawn to the case of *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649, a decision of Augustine Paul J (later

FCJ). There His Lordship had occasion to broach on the subject of calling a rebuttal witness at p 705 (MLJ) pp 676–678 (CLJ) of the report and His Lordship had this to say:

> As the prosecution has failed to negate the suggestions made by the defence in the course of its case it may still rebut the defence advanced by cross-examination of the accused and his witnesses and/or, if possible, by calling Yee Chin Koon as a witness or tendering his police statement in evidence by re-opening its case at the end of the case for the defence. In seeking to adduce such rebuttal evidence the prosecution will be confronted with a problem as the general rule is that the prosecution must present its primary case completely before closing its case. This will include negating the case for the defence as suggested to its witnesses in cross-examination. A failure to observe this rule will result in the prosecution being precluded from adducing evidence in rebuttal on the ground that it would amount to the prosecution splitting its case. However, there is a discretion to allow evidence in rebuttal in very special or exceptional circumstances (see *Shaw v R* (1952) 85 CLR 365). This was lucidly explained by Wells J in *R v Killick* (1980) 24 SASR 137 at pp 152–154:
>
> > The topic of rebuttal evidence rarely comes up for review in the court of criminal appeal and it may be useful, as part of my reasons for judgment, if I attempt to formulate the propositions, in relation to that topic, that now appear to me to be sustainable.
> >
> > (1) Speaking generally, the prosecution must present completely, the evidence that supports the incriminating circumstances upon which it relies to constitute its primary case. A failure to observe this rule is likely to result in the prosecution's being forbidden to introduce further evidence after the accused has presented his defences upon the ground that the prosecution would be splitting its case.
> >
> > (2) Clearly exceptions to the general rule are recognised where by law, in the special circumstances of the case, the onus of proof rests upon the defence. In such cases, the prosecution may, after the special defence is concluded, adduce evidence directed to the task of rebutting that defence.
> >
> > (3) The trial judge possesses a power, which is exercisable having regard to all the circumstances of the case, to allow rebuttal evidence, but the power will not generally be exercised in favour of allowing rebuttal evidence unless those circumstances are 'very special or exceptional' (*Shaw's case* (1952) 85 CLR 365, at p 380). The judicial power is usually described as a discretion, but I prefer to describe it as a power coupled with a duty to make an evaluation of what is, viewed in the context of the trial, the initial Crown case, and to decide whether the Crown is attempting to improve

on something it has already begun, or whether it is seeking to refute something that can reasonably be characterised as fresh material contained in the defence case.

(4) A practical consequence of the foregoing rules is that, to the extent that the accused, in the course of an interview with law enforcement officers (undertaken by them as part of the investigations that led to the charges faced by him), or in the course of a statement made upon his committal for trial, foreshadowed the defence that he subsequently put forward, the Crown should, speaking generally, as part of its primary case, adduce such evidence as is reasonably available to them to refute the defence so foreshadowed. The Crown would not be expected to go beyond the limits set by the Privy Council in *Noor Mohammad v The King* [1949] AC 182, at p 191.

> The rationale for what, I apprehend, is a well-settled practice is that the interview, assuming that evidence of it is to be led, and the statement on committal, which is admissible according to s 110 of the Justices Act 1921–1979, are so closely integrated with the prosecution case that they are fit to be included in the same general category as other incriminating circumstances that are relied on by the Crown and supported by evidence and argument. Even here, however, there may be room for the trial judge to exercise his judgment, for the alibi or other special defence may, when first revealed, lack particularity, and if that particularity is furnished only at the trial, and not on either of the other two occasions, the Crown are not expected to exhibit powers of imagination and invention, and attribute to the accused a defence which has not yet really been disclosed. (Compare the particularly trenchant comment of Phillimore J in *R v Froggatt* (1910) 4 Cr App R115 at p 118, arguendo).

(5) Another kind of case where rebuttal evidence is likely to be appropriate, and which is encountered far too often in practice, is to be found where one side has failed to comply with the rule of practice and common fairness usually identified by the description 'the rule in *Browne v Dunn* (1894) 6 R 67 (HL).' In such a case, it will emerge that one side has failed to put part of its case to a witness, called by the other side, who is concerned with that part, and has then led evidence from its own witness or witnesses as to the matters not put. When this occurs, the party whose witness has been thus wronged usually has the clear right to recall that witness in order to enable him to deal specifically with the matters not previously put to him.

(6) Where the prosecution is, or reasonably appears to be, relying, in its primary case, upon a particular incriminating circumstance, though the evidence supporting it is weak, and the answer made by the accused changes the structure of proof of that circumstance so that, if permitted,

A

the prosecution could lead further evidence that would, in the changed circumstances, greatly strengthen that proof, it is to be expected that an application to call that further evidence would be refused.

B

(7) The distinction is, however, clear and fundamental between the sort of case described in par 6 above (which is derived from the particular facts in *Shaw's case* (1952) 85 CLR 365) and the sort of case discussed by James J in *Reg v Levy and Tait* (1966) 50 Cr App R 198 where evidence, at the stage in the trial when the primary prosecution case is in proof, is known to the prosecution, but is of minimal, doubtful, or marginal, value. If, in the

C

latter sort of case, after the defence has been presented, the same evidence appears to be of clear probative force, the evidence may well be allowed to be led in rebuttal. It is a question of fact and degree in each case.

D

(8) The foregoing propositions do not purport to be exhaustive; they are intended to be no more than a summary of some of the more frequently encountered applications of the general rule, which is based upon broad considerations of fairness.

E

[17] Mr Hisyam Teh Poh Teik submitted that the learned JC allowed the rebuttal evidence on the basis that the 'accused had never suggested nor put, in his cross-examination of the prosecution witnesses, that the said bag had in fact belonged to Lamran' (see the written judgment of the learned JC at p 229 of the appeal record at *jilid* III). Using this passage as a springboard, learned counsel

F

for the appellant submitted that the learned JC erred and failed to appreciate the core of the defence case.

[18] It is always misleading to quote a small segment of the learned JC's judgment and then criticised it out of context. It is appropriate, at this

G

juncture, to reproduce verbatim what the learned JC wrote in his judgment as seen at pp 229–230 of the appeal record at *jilid* III in regard to the rebuttal evidence:

H

10 When cross-examined by the learned DPP, the accused person said that when he carried the said bag, he had found it to be neither heavy nor light, 'tidak berat dan tidak ringan'. He also said that he always saw Lamran bringing the said bag to carry his repair tools in a tool-box because according to the accused person, Lamran was a motor-cycle mechanic. The learned DPP put again to the accused person the salient features of

I

the case for the prosecution to the accused person but were denied by the latter.

11 After the accused had completed with his evidence, the learned counsel had indicated to this court that he was not calling any other witness and

that the accused person was closing his case. At this juncture, the learned DPP had applied to this court to call a rebuttal witness in the form of the said Lamran. He had cited s 425 of the Criminal Procedure Code ('the CPC') as enabling him so to do. The learned counsel had objected to this application, saying that the prosecution should have called Lamran during the prosecution case. The learned DPP responded by saying that it had never been the prosecution's case that the said bag had belonged to Lamran and as such there was no need for the prosecution to call Lamran to prove what essentially is a negative and something which in the context of its case has never been part of the prosecution's case. On top of that, it was submitted by learned DPP that the accused had never suggested nor put, in his cross-examination of the prosecution witnessess, that the said bag had in fact belonged to Lamran. Having considered the circumstances pertaining to this issue, I was of the considered view that the learned DPP was correct in his approach and I had ruled that the situation as presented before me was a fit and proper one for this court to invoke the provisions under s 425 of the CPC for the just decision of the case. So Lamran was called as a rebuttal witness for the prosecution and his ensuing testimony literally destroyed practically everything that the accused person had said regarding the ownership of the said bag and even the accused person's version as to what had happened prior to him ending up as a pillion rider on Lamran's motorcycle on the day in question. In the course of cross-examination of Lamran, learned counsel had elicited information from him that he was undergoing restricted residence order at Sg Buloh and that he was never charged for this incident for which this accused person had stood trial. In short learned counsel was trying to cast aspersions on the creditworthiness of Lamran. I had observed Lamran when he was testifying before me and I could see no reason why this court should doubt his evidence. What Lamran had said would explain why the accused person did not suggest nor put to the relevant prosecution witnesses during cross-examination that the said bag had in fact belonged to Lamran.

[19] Now, we can appreciate the full text of the judgment of the learned JC in the context of rebuttal evidence. His Lordship was merely echoing the submission of the learned deputy public prosecutor that there was no cross-examination of the prosecution witnesses that the sling bag (P6C) belonged to Lamran. It must be borne in mind that in his defence the appellant testified in cross-examination that he always 'saw Lamran bringing the sling bag containing Lamran's repair tools in a tool box because Lamran was a motorcycle mechanic'. This piece of evidence elicited from the appellant under cross-examination showed that the sling bag (P6C) belonged to Lamran yet there was no cross-examination of the prosecution's witnesses on this point. Again, in examination-in-chief, the appellant testified that when Lamran came to his house on the motorcycle to fetch the appellant, the appellant saw Lamran carried a sling bag (P6C) across Lamran's shoulders. However, there was no

cross-examination of SP1 and SP5 on this point. Thus, it is not surprising that the learned JC allowed the prosecution's application to call Lamran as a rebuttal witness.

[20] Not to be outwitted, Mr Hisyam Teh Poh Teik submitted that the crux of the defence case was not that the sling bag (P6C) belonged to Lamran but rather that the drugs was not found inside the sling bag (P6C) as alleged by both SP1 and SP5 but elsewhere. As such, according to learned counsel, whether the sling bag (P6C) belonged to Lamran or otherwise bears no consequence. According to learned counsel for the appellant this aspect of the defence case was indeed put across to both SP1 and SP5. Our attention was drawn to the evidence of SP1 under cross-examination as seen at p 44 of the appeal record at *jilid* I, which reads as follows:

> Saya tidak setuju yang OKT telah dibawa ke luar tandas oleh anggota saya untuk berjumpa dengan saya di mana pemeriksaan telah dijalankan ke atasnya.
>
> Saya tidak setuju yang apabila diperiksa beg Nike berwarna biru dan kelabu — P6C, itu adalah kosong dan tidak mengandungi apa-apa benda.
>
> Saya tidak setuju selepas itu, seorang anggota polis telah pergi balik ke tandas dan kemudiannya membawa bersamanya satu bungkusan hitam yang diserah kepada saya.

[21] Through the cross-examination of SP1, it was the defence versions that:

(a) the appellant was brought out of the toilet to meet SP1 for purposes of examination which meant that SP1 never entered the toilet and SP1 cannot narrate as to what had transpired in the toilet;

(b) the sling bag (P6C), upon examination, was empty; and

(c) that a member of the police raiding party re-entered the toilet and came out and brought a black plastic bag which was handed to SP1 which meant that the black plastic bag with its incriminating contents were not found inside the sling bag (P6C).

[22] So, who was the member of the police raiding party that re-entered the toilet and re-emerged with the black plastic bag?

[23] In examination-in-chief, the appellant testified that a Malay man subsequently came out from the toilet and brought a black plastic bag and handed it to SP1. And the question to pose would be: who was that Malay man?

[24] The learned deputy public prosecutor in the person of Madam Fatnin bt Yusof correctly pointed out that opportunites were accorded to the appellant

to identify all the police personnel who ambushed the toilet that evening on 10 August 2005 during the course of the trial. But the appellant took an easy way out by saying that he could not identify that person notwithstanding the fact that he was certain that that male person was one of the police parties that rushed inside the toilet.

[25] Now, according to Mr Hisyam Teh Poh Teik, the cross-examination of SP5 on this aspect of the case went on similar lines and he painstakingly took us through the appeal record. At p 82 of the appeal record at *jilid* I, SP5 was cross-examined in this way:

P/B : Saya katakan semasa kamu sampai ke tandas, OKT telah dibawa keluar dari tandas.

SP5 : Saya tidak setuju.

[26] Continuing at the bottom of the same page, SP5 was cross-examined further in this way:

P/B : Setelah gagal menjumpai barang-barang yang salah di sisi undang-undang, anggota serbuan telah masuk ke dalam tandas untuk mencari barang salah.

SP5 : Saya tidak setuju.

P/B : Dan selepas beberapa minit anggota serbuan telah keluar dari tandas bersama-sama dengan satu plastik beg warna hitam.

SP5 : Saya tidak setuju.

[27] Mr Hisyam Teh Poh Teik further submitted that the defence case can be distilled from the examination-in-chief of the appellant himself as seen at p 110 of the appeal record at *jilid* II which reads as follows:

Mereka telah merampas kedua-dua beg tersebut daripada saya.

[28] Learned counsel also drew our attention to p 111 of the appeal record at *jilid* II where the appellant in examination-in-chief had this to say:

A

> Dia (referring to SP1) telah periksa beg galas itu di hadapan saya. Tidak ada apa-apa article larangan dijumpai di dalam gambar itu. Insp Tarmizi (referring to SP1) tidak ada jumpa apa-apa di dalam beg galas itu.

B

[29] Further down the same page of the same appeal record, the appellant in examination-in-chief testified:

> Telah datang seorang lelaki membawa plastik warna hitam dari arah tandas, lalu menyerah beg plastik warna hitam itu kepada Insp Tarmizi (referring to SP1).

C

[30] Relying on these passages, learned counsel for the appellant submitted that it was clear that the ownership of the sling bag (P6C) was never an issue. And that the appellant had maintained at all times that the sling bag (P6C) was with him but the drugs were never found in the sling bag (P6C).

D

[31] Learned counsel for the appellant further submitted that had the learned JC viewed the evidence from this angle it would therefore be unnecessary for the prosecution to call Lamran as a rebuttal witness. Consequently, according to learned counsel for the appellant, the failure of the
E appellant to put to the prosecution witnesses that the sling bag (P6C) belonged to Lamran is not crucial for the calling of the rebuttal witness as ownership of the sling bag (P6C) is part of the appellant's narration and not the case of the defence. As such, according to learned counsel, the basis upon which the learned JC allowed the rebuttal evidence does not qualify as a 'special or
F exceptional circumstance' warranting rebuttal evidence as discussed by Wells J in *R v Killick* (1980) 24 SASR 137 at pp 152–154 and endorsed by Augustine Paul J (later FCJ) in *Public Prosecutor v Chia Leong Foo*.

[32] Mr Hisyam Teh Poh Teik further submitted that the appellant had been
G seriously disadvantaged with the calling of the rebuttal witness. Learned counsel also submitted that the appellant in objecting to the prosecution's application to call rebuttal evidence had also objected on the basis that it had urged the learned JC to draw an adverse inference against the prosecution under s 114(g) of the Evidence Act 1950 at the end of the prosecution's case.

H

[33] According to Mr Hisyam Teh Poh Teik, the issue of adverse inference under s 114(g) of the Evidence Act 1950 can be re-canvassed at the end of the defence case and it can still be invoked even at that stage. As authority, learned counsel for the appellant again referred to the case of *Public Prosecutor v Chia*
I *Leong Foo* particularly at p 705 (MLJ) p 679 (CLJ) of the report:

> The presumption arising under s 114(g) is one of fact. It can therefore be raised at the end of the whole case. This is logical as the legal burden to prove the case is on the prosecution till the conclusion of the case. It is at the conclusion of the trial that the court will consider all the evidence adduced before it and decide whether the prosecution has proved its case beyond reasonable doubt. This exercise will necessarily entail a consideration of whether the defences advanced, where reasonable, have been negated by the prosecution. This can only be done by an evaluation of the evidence of witnessess who have been called by the prosecution and evidence which could have been adduced but was not. The exercise may reveal that the evidence of a witness not called, though not material at the close of the case for the prosecution, has turned out to be crucial in the light of the defence presented. The absence of the evidence of that witness on record at that stage may lead to the inference that if he had been called to testify by the prosecution in the course of its case his testimony would have been unfavourable within the meaning of s 114(g).

[34] According to Mr Hisyam Teh Poh Teik with the calling of the rebuttal witness by the prosecution, this point of law has been completely taken away and the appellant is now deprived. And he further submitted that in considering whether to exercise his discretion in favour of the prosecution, the learned JC ought to have considered this very important aspect of the law.

[35] It is now ideal to reproduce s 425 of the Criminal Procedure Code:

> Power of Court to summon and examine persons
>
> 425 Any Court may at any stage of any inquiry, trial or other proceeding under this Code summon any person as witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

[36] This section is a blanket approval to the court at any stage of inquiry, trial or other proceeding to summon, examine, re-examine any person in attendance or those who have given evidence if their evidence appears to be essential to the just decision of the case. The learned JC applied s 425 of the Criminal Procedure Code correctly when His Lordship held that the rebuttal evidence was allowed 'for the just decision of the case' (see the written judgment of the learned JC at p 229 of the appeal recored at *jilid* III).

[37] Reception of rebuttal evidence varies from case to case and each case has to be considered on its own facts. Thus, if the rebuttal evidence appears essential to the just decision of the case within the meaning of s 425 of the Criminal Procedure Code, it is legally permissible to allow the rebuttal evidence to be admitted as evidence.

[38] Case laws have given life to s 425 of the Criminal Procedure Code. Thus, in *Public Prosecutor v Chia Leong Foo*, Augustine Paul J (later FCJ) said that 'there is a discretion to allow evidence in rebuttal in very special or exceptional circumstances'.

[39] Taylor J speaking for the Court of Appeal in *Balfour v Public Prosecutor* [1949] Supp MLJ 8 had this to say (see the headnotes):

> … that although s 425 of the Criminal Procedure Code authorises the court to call an additional witness at any stage and although the court may, in special circumstances, properly do so of its own motion where a case is conducted by counsel, and more especially where a preliminary enquiry has been held, this power should be exercised only in rare cases as, for instance, where one side has raised at the trial a point which the other side could not have foreseen.

[40] Syed Othman J in *Public Prosecutor v Abdul Hamid* [1969] 1 MLJ 53, at p 54 had this to say:

> No doubt s 425 of the Criminal Procedure Code gives a wide power to the court to summon and examine any person to give evidence but this power, as has been reiterated by many authorities which I need not cite here, must be exercised with the utmost caution and only when as set out in the provisions the evidence of that person appears to the court essential to the just decision of the case.

[41] The accused in *R v James Milliken* (1969) 53 Cr App R 330 (CA), when giving evidence for the first time accused certain police officers, some of whom gave evidence that they had seen the accused committing the offence, of a conspiracy to fabricate evidence. The trial judge allowed the prosecution to call evidence in rebuttal, on the basis that such evidence became relevant only when the accused gave evidence. And this ruling was upheld by the Court of Appeal. The Court of Appeal also held that the evidence in question was not in any sense probative of the guilt of the accused since it consisted of no more than denials of the accusations of conspiracy and concoction.

[42] The prosecution in *R v David Flynn* (1958) 42 Cr App R 15, was allowed to call evidence in rebuttal of an alibi defence, the details of which became known for the first time when the accused gave evidence.

[43] The facts of the present appeal especially the defence of the appellant justified the learned JC to invoke s 425 of the Criminal Procedure Code to allow the prosecution to call Lamran as a rebuttal witness. The exercise of discretion by the learned JC was essentially done in order to arrive at a just decision of the case. We are of the considered view that there are special or exceptional circumstances as alluded to earlier to support the decision of the learned JC in allowing Lamran to be called as a rebuttal witness.

[44] According to learned counsel for the appellant, the calling of Lamran after the defence had closed its case prevented the appellant from invoking s 114(g) of the Evidence Act 1950 against the prosecution. We saw no merit in this line of submission. It was only after the appellant gave his evidence on oath that the prosecution came to know for the first time of the necessity to call Lamran as a rebuttal witness. How could the prosecution foresee what the appellant would say in his defence? The prosecution do not have a crystal ball to see what is going to happen when the appellant takes the stand to defend himself. The details of the defence became known for the first time when the appellant gave evidence.

[45] Illustration (g) to s 114 of the Evidence Act 1950 allows the court to presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. It must be emphasised that the power of the court to draw such a presumption is discretionary (*Chua Keem Long v Public Prosecutor* [1996] 1 SLR 510; *Chia Sze Chang v Public Prosecutor* [2002] 4 SLR 523; *Khua Kian Keong and another v Public Prosecutor* [2003] 4 SLR(R) 526; and *Chew Gim Ser v Public Prosecutor* [2005] 1 SLR 201). In exercising its discretion, the court must look at the circumstances of the case and, 'Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence' and it can only be invoked 'for non-production of not just any witness but an important and material witness to the case' (per Mohamed Azmi SCJ in *Munusamy v Public Prosecutor* [1987] 1 ML J 492, LP 494 (SC)). In our judgment, Lamran was offered to the defence at the close of the prosecution's case and the defence accepted him and this by itself showed that there was no attempt by the prosecution to put Lamran at bay, away from the defence. In short, Lamran was not 'withheld' by the prosecution (*Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465, at p 519 (FC)). When the appellant took the witness box and testified, his defence showed that the sling bag (P6C) belonged to Lamran and by necessary inference the black plastic bag which was found inside the sling bag (P6C) containing the dangerous drugs — cannabis, according to the appellant belonged to Lamran and not the appellant. This piece of evidence that the sling bag (P6C) belonged to Lamran was not put across to SP1 and SP5 and it was because of this that the prosecution after the defence closed its case applied and was allowed by the learned JC to call Lamran as a rebuttal witness under s 425 of the Criminal Procedure Code. With this kind of legal manoeuvring by the prosecution, the defence argued that they were deprived of invoking s 114(g) of the Evidence Act 1950 against the prosecution for failure to call Lamran before the prosecution closed their case. It must be recalled that Mr Hisyam Teh Poh Teik earlier in the day argued that whether the sling bag (P6C) belonged to Lamran or otherwise bears no consequence and that the core of the defence was that the dangerous drugs were not found inside the sling bag (P6C) as alleged by SP1 and SP5 but elsewhere. If that is the defence of the appellant then he should not

object to the prosecution calling Lamran as a rebuttal witness in order to show ownership of the sling bag (P6C) and its contents therein as alluded to by SP1 and SP5.

[46] In regard to the defence of the appellant, the learned JC rightly assessed it in this way (see pp 228–229 of the appeal record at *jilid* III):

> 9 In essence, what the accused had tried to impress upon this court has been that he had nothing to do with the impugned drugs that were said to have been seized by SP1 from inside the said bag. While the accused person did not deny that he had carried the said bag when he was arrested, he had nevertheless alleged that the bag was not his and that it had belonged to his friend Lamran and that he had explained how he had ended up with the said bag. Furthermore, according to him, the bag was empty when SP1 examined it outside the said toilet near the petrol kiosk. As the impugned drugs were found inside a black plastic bag brought out of the same toilet by a Malay man, the accused was saying to this court that he was a victim of a frame-up.

[47] Was the appellant framed-up by the police? the learned JC answered it in the negative (see p 230 of the appeal record at *jilid* III):

> Both SP1 and SP5 had said that they did not know this accused person before the arrest and there is nothing in the evidence adduced in this case to suggest that the arrest of the accused had been motivated by the alleged intention on the part of the police to frame-up this accused person. Indeed this allegation was never put to either SP1 or SP5 when they were in the witness stand during cross-examination by learned counsel.

[48] We agree with the learned JC that there was no frame-up by the police.

[49] Lamran's evidence supported the prosecution's case to the fullest. If a cake needs an icing to make it look good then to the prosecution Lamran is that icing. This was what Lamran testified under examination-in-chief:

(a) on 10 August 2005, he worked as a motorcycle mechanic;

(b) the appellant is his friend;

(c) when shown the sling bag (P6C), he categorically said that it did not belong to him;

(d) he was arrested on 10 August 2005 in front of McDonald's restaurant at Projet petrol station; while the appellant was arrested inside the toilet of the same vicinity;

(e) that he only saw the sling bag (P6C) when he was at the Gombak police station after he was arrested;

(f) that he did not realise the existence of the sling bag (P6C) until he arrived at the Gombak police station; and

(g) that the sling bag (P6C) did not belong to him and he never carried the said bag on the date of the offence.

[50] Under cross-examination, Lamran had this to say:

(a) that he was arrested when he was on the motorcycle and that he was not brought to see the appellant after he was arrested by the police;

(b) that he did not witness the arrest of the appellant and that he only knew of the arrest of the appellant when he was at the Gombak police station;

(c) he disagreed to a suggestion that he asked the appellant to go with him to retrieve a motorcycle that had broken down;

(d) he disagreed to a suggestion that he fetched the appellant at the appellant's house. He said that he fetched the appellant in front of Sekolah Raja Abdullah in Jinjang;

(e) that on the day in question, he did not bring any bag at all. He disagreed to a suggestion that he handed the sling bag (P6C) to the appellant on the day in question;

(f) that he was the one who rode the motorcycle with the appellant riding pillion;

(g) he disagreed to the suggestions that he carried the sling bag (P6C) across his shoulders which caused the appellant to feel uncomfortable and he then asked the appellant to carry the sling bag (P6C) instead;

(h) he said that he was charged in court together with the appellant and that he was released without any condition on a police bail. He said that he is now a witness in this case. He said that he came to court on a motorcycle at the request of the investigating officer a week ago to attend the hearing of this case;

(i) he admitted that he is now undergoing a restricted residence order at Sungai Buloh and he is required to report to the police station every Monday of the week;

(j) he disagreed that he gave evidence because he was forced by the police;

(k) he disagreed that he was directed not to admit ownership of the sling bag (P6C). He categorically said that in actual fact that sling bag (P6C) did not belong to him. He disagreed that he gave this sort of evidence because he wanted to escape from being implicated with the charge; and

(l) he disagreed that he told a pack of lies to the court.

[51] On being re-examined by the prosecution, Lamran said that he was not lying when he testified in court on that day.

[52] It is true like what the learned JC said that Lamran's evidence 'literally destroyed practically everything that the accused had said regarding ownership of the said bag'.

[53] It is our judgment that the rebuttal evidence adduced through Lamran was properly admitted by the learned JC. 'Evidence in rebuttal' is a wide ranging terminology and it is capable of embracing various categories of evidence. Thus, evidence in rebuttal may even be called to meet evidence of good character given for the defence (*Regina v Rowton* (1865) Le & Ca 520; and *Rex v Butterwasser* [1948] 1 KB 4). Another good example would be the case of *R v Blick* (1966) 50 Cr App R 280 (CCA). In that case, during his trial for robbery, Blick said that his presence where he had been arrested was due to a visit to a public lavatory. A juror who knew the area passed a note to the judge informing him that the lavatory was closed at the material time. The prosecution later obtained leave to call rebutting evidence to that effect. It was held that the evidence was properly admitted.

THE SECOND AROUND

[54] Our attention was drawn to the written grounds of judgment of the learned JC, in particular to p 230 of the appeal record at *jilid* III, where His Lordship said:

> I had observed Lamran when he was testifying before me and I could see no reason why this court should doubt his evidence.

[55] And based on this passage, it was submitted that the learned JC fell into an error and misdirected himself. According to learned counsel for the appellant, demeanour alone is not the touchstone of credibility. Taylor J's judgment in *Leow Nghee Lim v Reg* [1956] MLJ 28 was then referred to where His Lordship remarked at p 30 to the following effect:

> The magistrate explained, with commendable care, his reasons for rejecting the evidence of the accused. He said the demeanour of the accused in the box was bad. It certainly was very bad but demeanour is a most unsafe guide. It sometimes happens that a perfectly honest man becomes confused and contradictory in the witness box whereas many rogues have excellent demeanour.

[56] We were invited to test the credibility of Lamran in accordance with the principle of maximum evaluation by taking into account the following factors:

(a) that Lamran was the rider of the motorcycle and arrested together with the appellant;

(b) that according to SP1, the target of the tip-off was the rider of the motorcycle WCK 897;

(c) that Lamran was charged together with the appellant for the same offence read with s 34 of the Penal Code; and

(d) that Lamran at the time of giving evidence was a restricted resident.

[57] We were also referred to the case of *Tengku Mahmood v Public Prosecutor* [1974] 1 MLJ 110, especially to a passage of Raja Azlan Shah J (as His Royal Highness then was) and that passage reads as follows:

> The central question to be considered in this appeal is whether on the record, as it stands, the learned president was right in accepting the complainant as a witness of truth.
>
> As regards authority, there is, I think, very little to be said. It is hardly necessary to go further back than *Tara Singh v Public Prosecutor* [1949] MLJ 88, 89 in 1948. In that case it was held that impression as to demeanour of a witness must be critically tested against the totality of his evidence. Now, the learned president, it is true, had a great advantage over this court. He saw and heard the witness and I did not. But the demeanour is not always the touch-stone of truth. It is only one ingredient in arriving at a finding of credibility. But so also is motive.

[58] By referring to these two authorities and submitting along those lines, learned counsel for the appellant was saying that it was unsafe to convict the appellant for the offence of trafficking in dangerous drugs as per the charge.

[59] Learned counsel for the appellant further submitted that the appellant had suffered a great prejudice in that by accepting Lamran's evidence at face value, it had the effect of 'literally destroyed practically everything that the accused person had said regarding the ownership of the said bag and even the accused person's version as to what had happened prior to him ending up as a pillion rider on Lamran's motorcycle on the day in question' (to borrow the words of the learned JC at p 229 of the appeal record at *jilid* III).

[60] And learned counsel for the appellant further submitted that 'it is amazing to note that the spoken words of Lamran had such 'tsunami' effects in the eyes of His Lordship' (see the written submission of learned counsel at p 12).

[61] We pause here for a moment and take stock of the whole matter. We see nothing wrong with the forensic fact-finding of the learned JC. His Lordship has evaluated the evidence before him with a toothcomb. He has marshalled the facts and the law accurately. Case law precedent, in the form of judicial rulings in decided cases by judges, has traditionally been the most productive

source of evidentiary principle. However, in modern times, the common law has been siginificantly modified and augmented by local statutes. Thus, we have in our midst s 425 of the Criminal Procedure Code and the learned JC applied it generously in favour of the prosecution by allowing Lamran to be called as a rebuttal witness for the just decision of the case.

[62] At this juncture, it is opportune to reproduce the speech of Tindal CJ in *Regina v Frost And Eleven Others* (1839) 9 Car & P 129 at column 159:

> There can be no doubt about the general rule, that where the Crown begins a case (as it is with an ordinary plaintiff), they bring forward their evidence, and cannot afterwards support their case by calling fresh witnesses, because there may be evidence in the defence to contradict it. But if any matter arises ex improviso, which the Crown could not forsee, supposing it to be entirely new matter, which they may be able to answer only by contradictory evidence, they may give evidence in reply. In this instance, there appears to me to be a necessity for asking this question, and, therefore, that it is reasonable for the Crown to call this witness back.

[63] And Lord Goddard CJ in *Regina v John Owen* [1952] 2 QB 362, at p 367 remarked that the above passage was 'probably in wider language than would be applied at the present day'. Here, we have s 425 of the Criminal Procedure Code and the learned JC, in exercising his discretion, has determined the relevance of the evidence of Lamran because the calling of Lamran at the stage of the prosecution's case could not reasonably have been anticipated bearing in mind that there was no cross-examination of SP1 and SP5 in regard to Lamran being the owner of the sling bag (P6C). Furthermore, it had never been the prosecution's case that the sling bag (P6C) belonged to Lamran. All along, it was the prosecution's case that the sling bag (P6C) belonged to the appellant. Thus, when Lamran gave evidence as a rebuttal witness he categorically said that the sling bag (P6C) belonged to the appellant. To the learned JC, Lamran is a witness of veracity. According to Yong Pung How (CJ Singapore) in *Kwang Boon Keong Peter v Public Prosecutor* [1998] 2 SLR 592, p 602 that 'the credibility of a witness refers to his mental capacity and power to be a witness of veracity'. The learned JC believed Lamran and accepted his evidence against the evidence of the defence in relation to the sling bag (P6C).

[64] It is correct to say that all criminal trials are concerned with disputes about facts. In principle and in practice, fact-finding which must necessarily include the assessment of credibility rest on the shoulders of the trial judge who hear and see the witnesses. The appellate court has no such liberty. Judging credibility is a matter of common sense. And credibility stems wholly or partly from an impression of a witness's demeanour. An experienced trial judge can easily detect 'lying' just by looking at the person's demeanour.

[65] Dictionaries define the word 'demeanour' in many ways. Thus, it has been defined as 'bearing', 'outward behaviour', 'conduct', 'mien', 'comportment', 'manner' or even 'appearance'. The *Concise Oxford English Dictionary* at p 380 carries a definition of the word 'demeanour' which means 'outward behaviour or bearing'.

[66] 'Body language' is an important feature of demeanour. It is a 'non-verbal communication' that can tell a lot of things for the trial judge to observe and react judicially. If a trial judge's observation of the demeanour of a particular witness cannot be given weight then what is the point of appointing judges to hear cases be it civil or criminal.

[67] All witnesses in open court must take the oath. Once the oath is administered, from experience, certain fixed qualities are visible or audible and that would be the sex, age, build, hairstyle and the intonation of the voice. It is the general make up of the witness together with the voice that gives an impact on the trial judge. Again, from experience, the emotions of the witness will be manifested right before the eyes of the trial judge. Depending on the questions posed by the prosecution or the defence, the nervous system of the witness will be activated. Thus, the trial judge will detect blushing, pallor, perspiring, dry mouth, tremors and all kinds of facial expressions. It is blessed to be a trial judge to be able to see all these reactions of the witness when the witness gives evidence.

[68] Witnesses will also exhibit self-expressions like changes in posture, wild gestures, strong facial expression, and sudden change in the voice. All these may be genuine and spontaneous. Some of these signs may be faked attempts to convey sincerity or to elicit sympathy. Of course, it cannot be denied that some people are really good actors or accomplished liars. Some people too may react by losing their temper, fainting, crying, becoming very distressed, hysteria and the urge to go to the toilet.

[69] But we must not forget that human beings show their feelings and they also respond to the feelings of others. They are not robots.

[70] While acknowledging cases like *Leow Nghee Lim v Reg* and *Tengku Mahmood v Public Prosecutor*, it must be emphasised that, in appropriate contexts, signs of anxiety, guilt, agitation, embarrassment or other emotions may suggest that the speaker is or is not genuine. An exprerienced trial judge can tell the difference. We must trust our judges. Lamran's evidence is reasonable. There is nothing improbable about Lamran's evidence. The learned JC believed Lamran's evidence and His Lordship treatment of Lamran's evidence cannot be faulted. This was not the case where the learned JC convicted the appellant solely on his demeanour. The overwhelming evidence

tendered by the prosecution and the weak defence were the crucial factors that turned the tide against the appellant.

THE THIRD GROUND

[71] This ground centred on the complaint that the learned JC failed to appreciate the defence case. It was submitted that the defence of the appellant was criticised by the learned JC as a 'shifting' defence, as an 'afterthought' and that there was 'belated disclosure'.

[72] We beg to disagree. The learned JC considered the appellant's defence and this was what His Lordship said at pp 230–232 of the appeal record at *jilid* III:

> 12 My take on the defence put up by this accused person has been that it has been a shifting defence. While the accused person is at liberty to choose his line of defence, nevertheless once he has made a decision on his choice, he would be well advised to stick to it. In the context of this case, the defence put up by the accused person smacked of an afterthought or a belated disclosure. Looking at the accused person's line of defence, especially on the issue of the said bag that was carried by him prior to his arrest, in the light of his cross-examination of SP1 and SP5, one is left to wonder why the accused would bother about the said bag if indeed the bag was really empty as was alleged by him during the prosecution case. In fact, that allegation would run counter to his assertion when he was testifying in this court that he had felt inconvenienced by the said bag and its contents when the bag was initially carried by Lamran on his back when the accused person was a pillion rider on Lamran's motorcycle on that fateful evening. If the said bag was in fact empty it would not have mattered who had owned it or possessed it because such ownership or possession would have been entirely innocuous. It must be recalled that in the cross-examination of SP1 and SP5 by the accused person, the two slabs of plant materials were alleged to have been retrieved by SP1 from a black plastic bag brought by a Malay man from the said toilet, after SP1 had allegedly found the bag seized from the accused person to have been empty. Both SP1 and SP5 had said that they did not know this accused person before the arrest and there is nothing in the evidence adduced in this case to suggest that the arrest of the accused had been motivated by the alleged intention on the part of the police to frame up this accused person. Indeed this allegation was never put to either SP1 or SP5 when they were in the witness stand during cross-examination by learned counsel. It was also raised by the defence that the charge had read that the offence was said to have taken

place in front of the McDonald's Restaurant at the said petrol kiosk whereas the accused person was arrested in the toilet near the same petrol kiosk. Looking at the evidence led by the relevant prosecution witnesses the accused person was first seen by them carrying the said bag over his shoulders on his back when he was a pillion rider on the motorcycle which had stopped in front of the said fast food restaurant at the petrol kiosk. From there he had walked towards the public toilet where he was arrested subsequently. In my view, the toilet was well within the petrol kiosk area as well as in the front portion in relation to the said restaurant. His defence has not been misled or led astray by the said charge. As such, I see that there no prejudice had been occasioned to the accused person in consequence to the said charge as preferred against him. As alluded to earlier by me, the defence put up by the accused person had smacked of a belated disclosure or afterthought, I specifically would refer to the evidence whereby the accused person had said that he had gone to the toilet twice before he was arrested and that it was during the second tour to the toilet that he was arrested by a group of men whom he thought were robbers out to rob him. It was also averred to in his defence that he was arrested outside the toilet, not inside whereas when he cross-examined the SP1, he had only averred that SP1 was not one of the persons who had arrested him inside the toilet. Besides creating a contradicting scenario regarding his arrest, the accused person had failed to confront these factual assertions to respective prosecution's witnesses in particular, SP1 during his cross-examination by learned counsel. The law on this is clearly laid down in the case of *AEG Carapiet v AY Derderian* AIR 1961 Cal 359 as follows:

> The law is clear on the subject. Wherever the opponent has declined to avail himself to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witness in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiffs account in its entirety. Such failure leads to miscarriage of justice, first

A

by springing surprise upon the party when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.

B

This case was cited with approval by learned Justice Sharma J in the corruption case of *Chua Beow Huat v Public Prosecutor* [1970] 2 MLJ 29. The accused person in the case before me had failed to put his case to the relevant witnesses for the prosecution and what he did during his defence must be treated as an afterthought.

C

13 From the above appreciation of the defence evidence taken in its totality, I found that it has failed to create a reasonable doubt on the prosecution case in so far as the element of possession with mens rea is concerned.

D

[73] In our judgment, the learned JC is at full liberty and is entitled to criticise the defence as a weak defence and consequently, it has failed to raise a reasonable doubt in His Lordship's mind.

E

[74] We were reminded about the essence of the appellant's defence that:

(a) the sling bag (P6C) that the appellant had with him had no drugs; and

(b) the two slabs of drugs were handed to SP1 by another officer.

F

[75] In our judgment, the defence of the appellant was just plain and outright denial and that kind of defence cannot assist the appellant at all (*DA Duncan v Public Prosecutor* [1980] 2 MLJ 195, (FC); *Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324; and *Public Prosecutor v Nur Hassan bin Salip Hashim & Anor* [1993] 2 CLJ 551).

G

[76] The learned JC rightly commented that the defence of the appellant was a 'brave defence'. At p 233 of the appeal record at *jilid* III, the learned JC had this to say and we wholeheartedly agree with him:

H

Now, looking at the nature of the defence put up by the accused person in this case, it must be said that it was a brave defence. It is an 'all-or-nothing' kind of a defence. If his stated defence had created a reasonable doubt on the prosecution's case on the element of possession he would be completely exonerated from this charge of trafficking. It is to be recalled that the defence of this accused person had been one of complete denial in so far as the two slabs of cannabis that were found in his bag were concerned. An appreciation of his defence revealed that there was nothing in that defence that was articulated that could explain away the presumed fact of trafficking in the impugned drugs. His defence had been so crafted to negate the element of possession. Had he succeeded in creating a reasonable doubt on that

I

issue, the element of trafficking would become a non-starter. But, his defence as erected by him had failed to achieve its intended target. Viewed in the context of the said defence, I found that the accused person had failed to rebut the presumption of trafficking that had been invoked against him, on the balance of probabilities.

[77] Here, the prosecution succeeded in proving actual possession by the appellant of the dangerous drugs. And because of its quantity, the learned JC rightly invoked s 37(da) of the Act and the appellant shall be presumed, until the contrary is proved, to be trafficking in 1,727g of cannabis. Unfortunately, the appellant failed to rebut the presumption on the balance of probabilities.

[78] We have perused through the appeal record and deliberated at length in regard to the evidence. We too have perused the grounds of judgment of the learned JC. We found that the learned JC had correctly appraised the facts and had not misdirected himself on the law. The learned JC, taking advantage of the audio-visual, had rightly appreciated the evidence of both the prosecution and the defence. His Lordship too had correctly appraised the rebuttal evidence of Lamran.

[79] It is our judgment that the appellant's defence was not credible. We are always mindful of the law that the court need not be convinced of the defence story in order to entitle the appellant to an acquittal. The burden of proof on the appellant is merely to cast a reasonable doubt on the prosecution's case. We agree and we have no reason to disagree with the finding of the learned JC that the appellant's defence failed to raise any reasonable doubt in the prosecution's case with regard to mens rea possession. We are satisfied beyond reasonable doubt that the appellant had custody and control of the sling bag (P6C) and he knew that it contained the offending drugs. It is also our finding that the appellant had not rebutted the presumption of trafficking under s 37(da) of the Act on the balance of probabilities.

[80] In a well written judgment, the learned JC explored the facts and the law meticulously. His flair for the English language is quite apparent. It is a speaking judgment. We saw nothing wrong with his approach. He was right and it is safe to convict the appellant.

[81] We found no appealable error. It is our judgment that the appellant had failed to raise any reasonable doubt as to his guilt. We are satisfied that the prosecution had proved beyond reasonable doubt the charge against the appellant. We dismissed the appellant's appeal forthwith. The conviction and sentence are hereby affirmed.

A *Appeal dismissed.*

Reported by Kohila Nesan

B

C

D

E

F

G

H

I